Hong Leong Finance Bhd v Low Thiam Hoe and another appeal

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NOS 02(f)-53–08 OF 2013(W) AND 02(i)-57–08 OF 2013(W)
ARIFIN ZAKARIA CHIEF JUSTICE, RAUS SHARIF PCA, ZULKEFLI CJ (MALAYA), ABDULL HAMID EMBONG AND SURIYADI FCJJ
24 AUGUST 2015

Civil Procedure — Pleadings — Amendment — Application to amend defence — Whether Court of Appeal erred in allowing amendment appeal — Whether principles in Yamaha Motor case were sole consideration in deciding application to amend pleadings — Delay in applying to amend — Whether there were cogent reasons for delay — Whether plaintiff should have filed affidavit to oppose defendant's application to amend

The defendant/borrower had entered into a term loan agreement with the plaintiff. When the defendant defaulted in repayment of the loan, the plaintiff had commenced an action against him. The defendant had filed his defence and counterclaim and the case had proceeded through five pre-trial case management sessions. After the matter was fixed for trial, the defendant filed an application to amend the defence. By way of this application, the defendant sought to introduce two new and distinct defences, namely that he was a nominee and thus not liable for the loan and that the plaintiff had not accounted for the securities mortgaged by the defendant as security for the term loan facility. The High Court found that there was a gross delay in the filing of the application and that there was no credible explanation for the delay. In addition it was also found that the amendment would prevent the trial from proceeding. As such, the High Court dismissed the application to amend. The defendant appealed against the dismissal of the application to amend (the amendment appeal) but he had not applied for a stay of the hearing of the plaintiff's suit. The High Court accordingly proceeded with the trial on the merits and delivered judgment in favour of the plaintiff. The defendant thus filed a second appeal against the judgment entered against him after full trial (the merits appeal). The Court of Appeal allowed both appeals and made an order for a new trial of the whole action before another judge. The plaintiff thereafter applied for and obtained leave to appeal against the decision of the Court of Appeal on the amendment appeal and the merits appeal. It was the plaintiff's argument that the Court of Appeal had erred in solely relying on the test as laid down in *Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors* ('*Yamaha Motor*') in allowing the defendant's application to amend the defence and counterclaim.

Held, allowing the appeals with costs:

(1) *Yamaha Motor* was decided under the Rules of the High Court 1980. However, now under O 34 of the Rules of Court 2012, the progress of the case was no longer left in the hands of the litigants but with the court in the driver's seat. Courts in Malaysia had consistently held that where there was a delay in making an amendment application, the onus was on the applicant to furnish a reasonable explanation for such as delay and this was in effect an additional factor to the *Yamaha Motor*'s rules. In the present case, there had been five case managements since 2011 and there had been no indication at all that an amendment application was contemplated by the defendant. The only explanation given by the defendant in his affidavit for the delay was that he had only discovered that these two new issues were not pleaded when preparing for trial. Such an explanation could not be acceptable. In the circumstances, the Court of Appeal fell into an error of law when it applied the principles in *Yamaha Motor* without appreciating that those principles by themselves were insufficient to deal with an application to amend, which introduced two new defences on the eve of a trial. The Court of Appeal had also failed to appreciate that the defendant had to bear the burden of producing material and cogent reasons to explain why the change was sought so late (see paras 18, 25, 27, 29 & 33).

(2) The Court of Appeal also erred in holding that the plaintiff should have filed an affidavit to oppose the defendant's application to amend. This was because the defendant's affidavit in support of its application to amend contained nothing more than a bare assertion which carried no evidential value. Hence, there was nothing to reply. In any case, as the amendment application was filed on 16 March 2012, a Friday, and the hearing was fixed on 19 March 2012, a Monday, there was insufficient time for an affidavit in reply to be filed by the plaintiff (see paras 30 & 32).

(3) In view of the findings in respect of the amendment appeal, the merits appeal was rendered academic. Consequently, the orders made by the Court of Appeal were set aside and the orders made by the High Court restored (see paras 34–35).

[Bahasa Malaysia summary

Defendan/peminjam telah memasuki perjanjian pinjaman berjangka dengan plaintif. Apabila defendan gagal membayar balik pinjaman, plaintif telah memulakan tindakan terhadapnya. Defendan telah memfailkan pembelaan dan tuntutan balasnya dan kes itu telah diteruskan melalui lima sesi pengurusan kes sebelum perbicaraan. Selepas perkara itu ditetapkan untuk perbicaraan, defendan telah memfailkan permohonan untuk meminda pembelaan itu. Melalui permohonan ini, defendan memohon untuk

mengemukakan dua pembelaan yang baru dan berbeza, iaitu bahawa dia ialah penama dan oleh itu tidak bertanggungjawab untuk pinjaman itu dan bahawa plaintif tidak mengambil kira jaminan yang dicagarkan oleh defendan sebagai jaminan untuk kemudahan pinjaman berjangka itu. Mahkamah Tinggi mendapati bahawa terdapat kelewatan yang melampau dalam memfailkan permohonan itu dan bahawa tiada penjelasan yang boleh dipercayai untuk kelewatan itu. Tambahan pula ia juga didapati bahawa pindaan itu akan menghalang perbicaraan daripada bermula. Oleh itu, Mahkamah Tinggi telah menolak permohonan untuk meminda itu. Defendan telah merayu terhadap penolakan permohonan untuk meminda itu ('rayuan pindaan') tetapi dia tidak memohon untuk penggantungan perbicaraan guaman plaintif. Mahkamah Tinggi sewajarnya telah meneruskan perbicaraan atas merit dan menyampaikan penghakiman menyebelahi plaintif. Defendan dengan itu telah memfailkan rayuan kedua terhadap penghakiman yang dimasuki antaranya selepas perbicaraan penuh ('merit rayuan'). Mahkamah Rayuan telah membenarkan kedua-dua rayuan dan membuat perintah untuk perbicaraan baru berhubung keseluruhan tindakan di hadapan hakim lain. Plaintif selepas itu telah memohon untuk dan memperoleh kebenaran untuk merayu terhadap keputusan Mahkamah Rayuan berhubung pindaan rayuan dan merit rayuan. Adalah hujah plaintif bahawa Mahkamah Rayuan terkhilaf kerana semata-mata bergantung kepada ujian yang dinyatakan dalam kes *Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors* ('*Yamaha Motor*') yang membenarkan permohonan defendan untuk meminda pembelaan dan tuntutan balas.

Diputuskan, membenarkan rayuan-rayuan dengan kos:

(1) *Yamaha Motor* telah diputuskan di bawah Kaedah-Kaedah Mahkamah Tinggi 1980. Walau bagaimanapun sekarang di bawah A 34 Kaedah-Kaedah Mahkamah 2012, pelaksanaan kes tidak lagi dibiarkan dalam tangan litigan tetapi dengan mahkamah yang diberi keutamaan. Mahkamah-mahkamah di Malaysia sentiasa memutuskan bahawa di mana terdapat kelewatan dalam membuat pindaan kepada permohonan, beban terletak kepada pemohon untuk mengemukakan penjelasan yang munasabah untuk kelewatan tersebut dan ini sememangnya faktor tambahan kepada peraturan *Yamaha Motor*. Dalam ke ini, terdapat lima pengurusan kes sejak 2011 dan tiada tanda langsung yang permohonan pindaan itu dijangkakan oleh defendan. Satu-satunya penjelasan yang diberikan oleh defendan dalam afidavitnya untuk kelewatan itu adalah dia hanya menyedari dua isu baru itu tidak dipli semasa bersedia untuk perbicaraan. Penjelasan sebegini tidak boleh diterima. Dalam keadaan itu, Mahkamah Rayuan terkhilaf dari segi undang-undang apabila ia mengguna pakai prinsip-prinsip dalam *Yamaha Motor* tanpa memahami bahawa prinsip-prinsip tersebut dengan sendirinya tidak mencukupi untuk mengendalikan permohonan untuk meminda, yang

diperkenalkan dua pembelaan baru di hujung perbicaraan. Mahkamah Rayuan juga gagal memahami bahawa defendan terpaksa menanggung beban mengemukakan bahan dan sebab-sebab yang meyakinkan untuk menjelaskan kenapa pertukaran itu dipohon begitu lewat (lihat perenggan 18, 25, 27, 29 & 33).

(2) Mahkamah Rayun juga terkhilaf dalam memutuskan bahawa plaintif patut memfailkan afidavit untuk membantah permohonan defendan untuk meminda. Ini adalah kerana afidavit defendan yang menyokong permohonannya untuk meminda hanya mengandungi tidak lebih daripada dakwaan kosong yang tidak mempunyai nilai keterangan. Justeru, tiada apa untuk dijawab. Dalam apa-apa keadaan, oleh kerana permohonan pindaan itu telah difailkan pada 16 Mac 2012, hari Jumaat, dan perbicaraan telah ditetapkan pada 19 Mac 2012, hari Isnin, masa tidak mencukupi untuk afidavit jawapan difailkan oleh plaintif (lihat perenggan 30 & 32).

(3) Berdasarkan penemuan berkaitan rayuan pindaan, merit rayuan dianggap akademik. Berikutan itu, perintah-perintah yang dibuat oleh Mahkamah Rayuan diketepikan dan perintah-perintah yang dibuat oleh Mahkamah Tinggi dikekalkan semula (lihat perenggan 34–35).]

Notes

For a case on amendment, see 2(4) *Mallal's Digest* (5th Ed, 2015) para 6765.

Cases referred to

AON Risk Services Australia Ltd v Australian National University (2009) 258 ALR 14, HC (refd)

Bacom Enterprises Sdn Bhd v Jong Chuk & Ors [1998] 2 MLJ 301, CA (refd)

Claire Swain-Mason, David Jonathan Berry and Neil Gordon Kirby (executors of CJ Swain deceased) & Ors v Mills & Reeve (a firm) [2011] EWCA Civ 14, CA (refd)

Conlay Construction Sdn Bhd v Perembun (M) Sdn Bhd [2014] 1 MLJ 80, FC (refd)

Everise Hectares Sdn Bhd v Citibank Berhad [2010] MLJU 1379; [2011] 2 CLJ 25, CA (refd)

Hague Plant Limited v Martin Hartley Hague & 2 Ors [2014] EWHC 568 (Ch), HC (refd)

Ismail bin Ibrahim & Ors v Sum Poh Development Sdn Bhd & Anor [1988] 3 MLJ 348; [1988] 2 CLJ 632, HC (refd)

Ketteman and Others v Hansel Properties Ltd [1988] 1 All ER 38, HL (refd)

M Prabhkaran v Salam bin Seran [2001] 6 MLJ 368, HC (distd)

Raphael Pura v Insas Bhd & Anor [2001] 1 MLJ 49; [2000] 4 CLJ 830, CA (refd)

Savings and Investment Bank Ltd v Fincken [2004] 1 All ER 1125, CA (refd)

Skrine & Co v MBf Capital Bhd & Anor [1998] 3 MLJ 649, CA (refd)

Syed Omar bin Syed Mohamed v Perbadanan Nasional Bhd [2013] 1 MLJ 461; [2012] 9 CLJ 557, FC (refd)
Taisho Co Sdn Bhd v Pan Global Equities Bhd & Anor [1999] 1 MLJ 359; [1999] 1 CLJ 703, CA (refd)
Teoh Yook Huwah v Menteri Hal Ehwal Dalam Negeri & Ors [1993] 1 MLJ 12, SC (refd)
Worldwide Corporation Limited v GPT Limited and another [1998] EWCA Civ 1894 (refd)
Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors [1983] 1 MLJ 213, FC (distd)

Legislation referred to

Rules of Court 2012 O 34
Rules of the High Court 1980 O 20 r 5, O 34, O 34 r 4(1)

Cyrus Das (Andrew Chiew Ean Vooi with him) (Lee Hishamuddin Allen & Gledhill) for the appellant.
Yokinee Selvam (Yokinee Selvam) for the respondent.

Zulkefli CJ (Malaya) (delivering judgment of the court):

INTRODUCTION

[1] These are two appeals filed before us by the appellant against the two decisions of the Court of Appeal on 7 November 2012 which allowed the appeals by the respondent against the decisions of the High Court. The appellant was the plaintiff and the respondent was the defendant before the High Court. We shall refer to the parties as they were before the High Court.

[2] There were two separate appeals before the Court of Appeal. We shall refer to the first appeal as the amendment appeal and the second appeal as the merits appeal. The Court of Appeal had allowed the defendant's appeal in the amendment appeal against the High Court's dismissal of the defendant's application to amend the defence and counterclaim ('the first decision'). The Court of Appeal also made an order setting aside the High Court's judgment entered against the defendant after full trial in the merits appeal and ordered a new trial of the whole action before another judge ('the second decision').

[3] It is to be noted that the defendant did not apply for a stay of the hearing on the merits of the plaintiff's case upon his application to amend the defence and the counterclaim being refused. The High Court accordingly proceeded with the trial on the merits and delivered judgment in favour of the plaintiff.

FACTS OF THE CASE

[4] The relevant background facts of the case are these. The defendant personally signed a term loan agreement as the borrower with the plaintiff. The defendant defaulted in repayment and the plaintiff brought an action on 19 August 1998 against the defendant for the repayment of the loan. On 16 April 1999 the defendant filed his defence and counterclaim. The main issues raised in the defence were firstly, whether there was a collateral agreement that the requirement under the facility agreement for the defendant to maintain a required security value of not less than 154% of the aggregate principal amount advanced would not apply to the defendant, and secondly, whether there was an agreement between the plaintiff and the defendant that the indebtedness of the defendant would be settled through a corporate exercise called the Torie Scheme. On 14 June 1999 the plaintiff filed its reply and defence to the counterclaim.

[5] The case went through five pre-trial case management sessions on 28 September 2011, 19 October 2011, 3 November 2011, 21 November 2011 and 13 January 2012. There was no intimation by the defendant at any time at the case management sessions of any need to amend the defence. On 24 February 2012 the High Court fixed the matter for trial on 19 March 2012 and 20 March 2012 on the pleading as it stood.

[6] On Thursday 15 March 2012, the defendant filed for the first time the application to amend the defence ('application to amend') and a counterclaim. It was served on Friday 16 March 2012 giving no time for the plaintiff to reply. The application to amend was fixed for hearing on Monday 19 March 2012 (ie the first day of trial). The amendment sought to introduce two new and distinct defences. First, by para 4 of the proposed amended defence the defendant alleged that he was a mere nominee and therefore not liable for the loan. Secondly, by para 35 of the proposed amended defence the defendant alleged that the plaintiff had not accounted for the securities mortgaged by the defendant as security for the facility, or the proceeds of their sale.

[7] In the defendant's affidavit in support of the application to amend there was no explanation for the gross delay other than stating that he had only discovered the new defences when preparing for trial that these purportedly important defences were not pleaded.

PROCEEDINGS AT THE HIGH COURT

[8] On 19 March 2012, the High Court heard and dismissed the application to amend. In dismissing the application to amend the High Court had relied on three factors, namely, the gross delay; the absence of any credible

explanation for the delay and importantly that the amendment will prevent the trial from proceeding. The learned trial judge in her judgment amongst others had this to say:

> ... Of course, I am aware that amendments can be made at any stage before judgment is delivered but not to prevent the trial from proceeding. It was made at the eleventh hour.

[9] The next day on 20 March 2012, the defendant filed the notice of appeal against the decision of the trial judge in dismissing the application to amend. However, the defendant did not apply for a stay but participated fully in the trial on all three subsequent days, namely 28 March 2012, 29 March 2012 and 12 April 2012. In all, seven witnesses were heard and judgment on the merits was given in favour of the plaintiff.

PROCEEDINGS AT THE COURT OF APPEAL

[10] The Court of Appeal fixed the amendment appeal and the merits appeal to be heard together on 7 November 2012. The Court of Appeal proceeded to first hear the amendment appeal. The Court of Appeal unanimously allowed the amendment appeal. The Court of Appeal then, without hearing the parties, allowed the merits appeal and ordered a new trial before a different judge.

[11] In reversing the decision of the High Court, the Court of Appeal in its judgment amongst others applied fully the test in *Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors* [1983] 1 MLJ 213. On the issue of bona fides, the Court of Appeal observed that the plaintiff ought to have filed an affidavit in reply to object to the defendant's application for amendment to his defence and counterclaim.

[12] The Court of Appeal also held that the proposed amendments did not prejudice the plaintiff. Further the Court of Appeal held that the proposed amendments did not change the character of the suit as the issue of the defendant being a nominee taking the loan had already been pleaded.

[13] As regards the merits appeal, the Court of Appeal decided the appeal without hearing the parties. It assumed that the merits appeal should be allowed as a matter of course after allowing the amendment appeal.

QUESTIONS OF LAW

[14] Leave to appeal against the decision of the Court of Appeal was granted to the plaintiff on the amendment appeal and the merits appeal on the following questions of law:

1. (a) Whether the principles in *Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors* (supra) are the sole consideration in deciding an application made on the eve of the trial, to amend pleadings to introduce a new case.

(b) If the answer to Question 1(a) is in the negative, what are the principles a court should properly apply, in deciding such an application in lieu of the *Yamaha Motor* principles?

(2) Where an appellate Court, after full trial of an action, allows a statement of defence to be amended to introduce a new and distinct defence, should the Court as a consequence ordinarily direct:

(a) a new trial only in respect of the issues arising from the new defence; or

(b) a new trial of all the issues, including those that have already been tried and decided by the High Court?

DECISION

The amendment appeal

[15] We shall first deal with the question of law posed under the amendment appeal. The Court of Appeal in reversing the decision of the High Court and allowing the defendant's application to amend his defence and counterclaim relied and applied fully the test as laid down in the case of *Yamaha Motor*.

[16] With respect, the Court of Appeal in applying the principles laid down in *Yamaha Motor*'s case had failed to consider that the *Yamaha Motor*'s case by itself was not concerned with the amendment made on the day of the trial as was done in the present case. The principles in *Yamaha Motor* in our view were laid down in respect of an application to amend that was made at an early stage of the proceedings in particular before the trial commences.

[17] In *Yamaha Motor*, the Federal Court amongst others considered the effect of O 20 r 5 of the Rules of the High Court 1980('RHC 1980') (now known as Rules of Court 2012 ('RC 2012')). The facts in *Yamaha Motor* showed that the application to amend the statement of claim was made about seven months after the original statement of claim was amended and the trial has not commenced.

[18] It is pertinent to note that *Yamaha Motor* was decided under the old RHC 1980. The civil procedure has since then changed with the introduction of the pre-trial case management in the year 2000 under O 34 of the RHC 1980 (22 September 2000) and now under O 34 of the RC 2012 (1 August

2012). Nowadays the court recognises especially under the new case management regime that a different approach needs to be taken to prevent delay in the progress of a case to trial and for its completion. The progress of the case is no longer left in the hands of the litigants but with the court in the driver's seat (see the case of *Syed Omar bin Syed Mohamed v Perbadanan Nasional Bhd* [2013] 1 MLJ 461; [2012] 9 CLJ 557). In particular when an application to amend the pleading is made at a very late stage as was done in the present case, the principles in *Yamaha Motor* ought not to be the sole consideration. This is because an order for compensation by payment of costs in such a case may not be an adequate remedy and it would also disrupt the administration of justice which affects the courts, the parties and the other users of the judicial process (see the case of *Conlay Construction Sdn Bhd v Perembun (M) Sdn Bhd* [2014] 1 MLJ 80).

THE LAW IN THE UNITED KINGDOM

[19] The development of the law relating to civil procedure and in particular with regard to amendment application on pleadings is not only seen in Malaysia but in other jurisdictions as well. In the United Kingdom as far back as 1988, the House of Lords in the decision of *Ketteman and Others v Hansel Properties Ltd* [1988] 1 All ER 38 had already taken into consideration the strain of litigation on parties when new issues are introduced and an amendment application is made late. The statement of a general principle against delayed amendment was well set out by Lord Griffiths in that case at p 62 as follows:

> Whether an amendment should be granted is a matter for the discretion of the trial judge and he should be guided in the exercise of the discretion by his assessment of where justice lies. Many and diverse factors will bear on the exercise of this discretion. I do not think it possible to enumerate them all or wise to attempt to do so. *But justice cannot always be measured in terms of money and in my view a judge is entitled to weigh in the balance the strain the litigation imposes on litigants, particularly if they are personal litigants rather than business corporations, the anxieties occasioned by facing new issues, the raising of false hopes, and the legitimate expectation that the trial will determine the issues one way or the other.* Furthermore, to allow an amendment before a trial begin, it is quite different from allowing it at the end of the trial to give an apparently unsuccessful defendant an opportunity to renew the fight on an entirely different defence.
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> Another factor that *a judge must weigh in the balance is the pressure on the courts caused by the great increase in litigation and the consequent necessity that, in the interests of the whole community, legal business should be conducted efficiently*. We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequences of the negligence of the lawyers to fall on their own heads rather than by allowing an amendment at a very late stage of the proceedings. (Emphasis added.)

The principle in *Ketteman* has been considered on numerous occasions by the Malaysian Courts (see the case of *Skrine & Co v MBf Capital Bhd & Anor* [1998] 3 MLJ 649 and *Bacom Enterprises Sdn Bhd v Jong Chuk & Ors* [1998] 2 MLJ 301).

[20] It is also to be noted that following the Lord Woolf Reforms in United Kingdom, a robust approach against last minute amendment was postulated in the leading case of *Worldwide Corporation Limited v GPT Limited and another* [1998] EWCA Civ 1894. In this case the claimant sought to amend its claim 11 days before the trial commenced. The claimant sought to amend and introduce a new case after realising that it could not succeed based on its pleaded case. The High Court dismissed the application. On appeal, Waller LJ held as follows:

> ... in previous eras it was more readily assumed that if the amending party paid his opponent the costs of an adjournment that was sufficient compensation to that opponent. *In the modern era it is more readily recognised that in truth the payment of costs of an adjournment may well not adequately compensate someone who is desirous of being rid of a piece of litigation which has been hanging over his head for some time, and may not adequately compensate him for being totally (and we are afraid there are no better words for it) 'mucked around" at the last moment. Furthermore, the courts are now more conscious that in assessing the justice of a particular case the disruption caused to other litigants by last minute adjournments and last minute applications have also to be brought into the scales.*
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> We share Millett LJ's concern that justice must not be sacrificed, but we believe his view does not give sufficient regard to the fact that the courts are concerned to do justice to all litigants, and that it may be necessary to take decisions vis-a-vis one litigant who may, despite all the opportunity he or his advisers have had to plead his case properly, feel some sense of personal injustice, for the sake of doing justice both to his opponent and to other litigants.
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> Where a party has had many months to consider how he wants to put his case and where it is not by virtue of some new factor appearing from some disclosure only recently made, why, one asks rhetorically, should he be entitled to cause the trial to be delayed so far as his opponent is concerned and why should he be entitled to cause inconvenience to other litigants? The only answer which can be given and which, Mr. Brodie has suggested, applies in the instant case is that without the amendment a serious injustice may be done because the new case is the only way the case can be argued, and it raises the true issue between the parties which justice requires should be decided.
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> We accept that at the end of the day a balance has to be struck. *The court is concerned with doing justice, but justice to all litigants, and thus where a last minute amendment is sought with the consequences indicated, the onus will be a heavy one on the amending party to show the strength of the new case and why justice both to him, his opponent and other litigants, requires him to be able to pursue it.* (Emphasis added.)

[21] Based on the principles laid out in the above case, we are of the view that there is therefore a heavy onus placed on the defendant in the present case to justify this application for amendment to the pleadings. The decision in *Worldwide Corporation*'s case has since been followed in a number of subsequent decisions in the United Kingdom with regard to late amendment applications and that the applicant must show the strength of the new case. In the case of *Savings and Investment Bank Ltd v Fincken* [2004] 1 All ER 1125, it was held that the court clearly expects the new case to have more than 'some prospect of success', particularly for late applications. The Court of Appeal held that:

> Ms Gloster submits that it is enough that these amendments have some prospect of success. That may be a suitable test where an amendment comes at a reasonably early stage of proceedings. After all, if any pleading whether by amendment or not, cannot meet the test of some real prospect of success, it is in danger of being struck out. *In my judgment, however, the proper rule or guideline calls for a sliding scale: the later the amendment, the more it may require to commend it ...* (Emphasis Added)

[22] In the case of *Claire Swain-Mason, David Jonathan Berry and Neil Gordon Kirby (executors of CJ Swain deceased) & Ors v Mills & Reeve (a firm)* [2011] EWCA Civ 14, the English Court of Appeal reiterated the need for an explanation for the delay in late applications and further stated that the proposed amendments had to be clear and detailed:

> A point which also seems to me to be highly pertinent is that, if a very late amendment is to be made, it is a matter of obligation on the party amending to put forward an amended text which itself satisfies to the full the requirements of proper pleading. It should not be acceptable for the party to say that deficiencies in the pleading can be made good from evidence to be adduced in due course, or by way of further information if requested, or as volunteered without any request. *The opponent must know from the moment that the amendment is made what is the amended case that he has to meet, with as much clarity and detail as he is entitled to under the rules.*
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> First, as *Worldwide Corporation v GPT* shows, there is a heavy burden on party who seeks to raise a new and significantly different case so late as the opening of the trial. *The party applying to amend needs to show why the change is sought so late and was not sought earlier.* (Emphasis added.)

[23] In *Hague Plant Limited v Martin Hartley Hague & 2 Ors* [2014] EWHC 568 (Ch), the High Court considered an application to amend the statement of claim 2 1/2 years after the action was filed. In dismissing the amendment application, the High Court referred to the principles laid down in *Swain-Mason* and *Worldwide Corporation* and reiterated that the court is and should be less ready to allow a very late amendment than it used to be in former times, and that a heavy onus lies on a party seeking to make a very late amendment to justify it.

THE LAW IN AUSTRALIA

[24] It is noted that the law in Australia in respect of late amendment applications also apply the same principles as set out in the case of *Worldwide Corporation*. In 2009, the High Court of Australia had the opportunity to consider the same issue in *AON Risk Services Australia Ltd v Australian National University* (2009) 258 ALR 14. Heydon J having considered *Worldwide Corporation* had this to say:

> [111] *An application for leave to amend a pleading should not be approached on the basis that a party is entitled to raise an arguable claim, subject to payment of costs by way of compensation. There is no such entitlement.* All matters relevant to the exercise of the power to permit amendment should be weighed. *The fact of substantial delay and wasted costs, the concerns of case management, will assume importance on an application for leave to amend …*
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> [112] A party has the right to bring proceedings. Parties have choices as to what claims are to be made and how they are to be framed. But limits will be placed upon their ability to effect changes to their pleadings, particularly if litigation is advanced. That is why, in seeking the just resolution of the dispute, reference is made to parties having a sufficient opportunity to identify the issues they seek to agitate.
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> [113] *In the past it has been left largely to the parties to prepare for trial and to seek the court's assistance as required. Those times are long gone.* The allocation of power, between litigants and the courts arises from tradition and from principles and policy. It is recognized by the courts that the resolution of disputes serves the public as a whole, not merely the parties to the proceedings.
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> [114] Rule 21 of the Court Procedures Rules recognises the purposes of case management by the courts. *It recognises that delay and costs are undesirable and that delay has deleterious effects, not only upon the party to the proceedings in question, but to other litigants. The Rule's objectives, as to the timely disposal of cases and the limitation of cost, were to be applied in considering ANU's application for amendment. It was significant that the effect of its delay in applying would be that a trial was lost and litigation substantially recommenced. It would impact upon other litigants seeking a resolution of their cases.* What was a 'just resolution' of ANU's claim required serious consideration of these matters, and not merely whether it had an arguable claim to put forward A just resolution of its claim necessarily had to have regard to the position of AON in defending it. An assumption that costs will always be a sufficient compensation for the prejudice caused by amendment is not reflected in r 21. Critically, the matters relevant to a just resolution of ANU's claim required ANU to provide some explanation for its delay in seeking the amendment if the discretion under r 502(1) was to be exercised in its favour and to the disadvantage of AON. None was provided. (Emphasis added.)

EXPLANATION FOR DELAY

[25] The Courts in Malaysia have consistently held that where there is a delay in making an amendment application, the onus is on the applicant to furnish a reasonable explanation for such a delay. They seem to have considered

this as an additional factor to the *Yamaha Motor*'s rules. The need to show 'some material and advance some cogent reasons' was applied in *Taisho Co Sdn Bhd v Pan Global Equities Bhd & Anor* [1999] 1 MLJ 359; [1999] 1 CLJ 703, Haidar JCA (as he then was) held:

> The learned judge intimated that the application was made after the appellant failed on appeal to this court to affirm the judgment entered by it initially. Further, he said that the appellant had knowledge of the 'acknowledgement' as late as April 1987, that is, four years before the action was filed. Furthermore, the application was filed four years after the commencement of this action. *We would add further that no reasons were given for the delay in filing the application when the point of admission was obviously available even before filing the proceedings. As rightly opined by the learned JC in Multi-Pak Singapore Pte Ltd and correctly followed by the learned judge, the appellant did not place some material and advance some cogent reasons to impel the court to lean on its side.* We would further add that the application borders on lack of bona fides, one of the basic question set out in *Yamaha Motor Co Ltd.* (Emphasis added.)

The requirement to advance some material and cogent reasons was likewise followed in the subsequent decisions in the cases of *Raphael Pura v Insas Bhd & Anor* [2001] 1 MLJ 49; [2000] 4 CLJ 830 and *Everise Hectares Sdn Bhd v Citibank Berhad* [2010] MLJU 1379 ; [2011] 2 CLJ 25.

[26] It is to be stated here the requirement that a cogent explanation for such a delay must be furnished when making a late application to amend would be clearly in line with pre-trial case management procedures (introduced in year 2000). The management of cases by the courts prior to the trial is intended to ensure 'just, expeditious and economical disposal' of an action (see O 34 r 4(1) of the RHC 1980, now O 34 r 1(1) of the RC 2012) and the Practice Direction No 2 of 2014 issued by the Chief Judge of High Court in Malaya). Timely disposal of cases and the limitation of cost are now the primary considerations under the present regime.

[27] In our instant case, there had been five case managements since 2011 and there was no indication at all that an amendment application was contemplated by the defendant. The only explanation given by the defendant in his affidavit for the delay was that he had only discovered that these new issues were not pleaded when preparing for trial. Such an explanation in our view surely cannot be acceptable.

TACTICAL MANOEUVRE

[28] Another factor which our courts have taken into consideration is whether the amendment application was made as a tactical manoeuvre. In the Court of Appeal case of *Everise Hectares Sdn Bhd v Citibank Berhad* the amendment application was disallowed as the application was a tactical manoeuvre to delay and prevent the respondent bank from completing the sale

of land. In the case of *Ismail bin Ibrahim & Ors v Sum Poh Development Sdn Bhd & Anor* [1988] 3 MLJ 348; [1988] 2 CLJ 632 the amendment application was disallowed as that amendment was made to circumvent the striking out application of the original writ and the statement of claim.

COURT OF APPEAL FELL INTO AN ERROR OF LAW

[29] In respect of the present case we are of the view the Court of Appeal fell into an error of law when it applied the principles in *Yamaha Motor* without appreciating that those principles by themselves are insufficient to deal with an application to amend, which introduced two new defences on the eve of a trial. The Court of Appeal failed to appreciate that the defendant bears the burden of producing material and cogent reasons to explain why the change was sought so late and was not sought earlier. In the defendant's affidavit in support, all that was stated was that he had only realised that important issues, namely the first and second proposed amendments were not pleaded when he was preparing for trial. On this point we are in agreement with the submission of learned counsel for the plaintiff that it is untenable for the defendant to have only realised fourteen years later that the syndicated term loan was granted to him as a nominee or that there were no details relating to the proceeds arising from the sale of the mortgaged securities. In our view these are immediate things that he would be aware of if they were true.

[30] It is noted in the present case the defendant's affidavit in support failed to adduce an explanation for the delay in filing the said application. The Court of Appeal however held that the plaintiff should have filed an affidavit to oppose the application to amend which the plaintiff failed to do. With respect in our view the Court of Appeal erred on this point again. This is because the defendant's affidavit in support of its application to amend contained nothing more than a bare assertion. A bare assertion carries no evidential value and hence, there is nothing to reply (see the case of *Teoh Yook Huwah v Menteri Hal Ehwal Dalam Negeri & Ors* [1993] 1 MLJ 12 (SC)). The defendant's affidavit also did not discharge the 'heavy onus' imposed on the amending party as the defendant did not disclose any 'material and cogent reasons' to explain the inordinate delay.

[31] We are also of the view the Court of Appeal had erroneously relied on the High Court's judgment in *M Prabhkaran v Salam bin Seran* [2001] 6 MLJ 368 in arriving at its decision. An examination of *M Prabhkaran* shows that the factual circumstances in that case were different from the present case. In *M Prabhkaran*, the plaintiff initially elected not to object to the defendant's application to amend but subsequently made an attack on the amendments. The observation of the High Court judge in *M Prabhkaran* was therefore made in that context. That is however not the case here.

[32] It is also to be noted in the present case the amendment application was served on the plaintiff on Friday (16 March 2012), and hearing was fixed on Monday (19 March 2012). There was no sufficient time for an affidavit in reply to be filed by the plaintiff.

[33] Having considered the facts and the circumstances of the present case, our views are as follows:

(a) when dealing with an application to amend the pleadings, which introduce a new case in the claim or defence, on the eve of the trial, the principles in *Yamaha Motor* are not the sole considerations;

(b) the principles in *Yamaha Motor* applies to cases where the application to amend the pleadings is made at an early stage of the proceedings;

(c) that there has to be a cogent and reasonable explanation in the applicant's affidavit as to why the application was filed late;

(d) that the application to amend the pleadings is not a tactical manoeuvre;

(e) that the proposed amendment must disclose full particulars for the court to ascertain if there is a real prospect of success in proving the same; and

(f) that lateness in the application to amend the pleadings cannot necessarily be compensated by payment of costs.

Accordingly, our answers to question 1(a) is in the negative and as for question 1(b), the matters to be considered in considering an application to amend pleadings are as set out in sub-paras (2)–(6) above.

THE MERITS APPEAL

[34] As regards the merits appeal in view of our answers to question 1(a) and (b) above, question 2 is rendered academic. Therefore, we do not propose to answer the same.

CONCLUSION

[35] For the reasons abovestated the plaintiff's appeals are allowed with costs. The orders made by the Court of Appeal on both the appeals are set aside and consequently the orders made by the High Court are hereby restored. We also make an order that the appeal by the respondent before the Court of Appeal on its merits without the amendment is to proceed and a date be fixed for hearing.

Appeals allowed with costs.

Reported by Kohila Nesan